

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH CUNNINGHAM	:	ORDER
	:	DTA NO. 825762
for Revision of a Determination or for Refund of	:	
Tax on Cigarettes and Tobacco Products under Article	:	
20 of the Tax Law for the Period January 23, 2004.	:	

Petitioner, Joseph Cunningham, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period January 23, 2004.

On September 9, 2013, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to Tax Law § 170(3-a)(e). On October 7, 2012, the Division of Tax Appeals received a letter from petitioner, appearing pro se, in opposition to dismissal. On October 25, 2013, the Division of Tax Appeals received correspondence submitted on behalf of the Division of Taxation by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel) in support of dismissal. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, issues the following order.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition filed in this matter.

FINDINGS OF FACT

1. On July 9, 2013, the Division of Tax Appeals received a petition from petitioner,

Joseph Cunningham, challenging an assessment of cigarette tax for the period ended January 23, 2004 (assessment L-023822439). The petition indicated that the assessment arose from the purchase of cigarettes over the internet, that the cigarettes were confiscated and that he was arrested for tax evasion. Thereafter, the prosecutor chose not to pursue the charges.

2. The petition included a copy of a Conciliation Order Dismissing Request, dated June 3, 2005, which pertained to the assessment at issue in this matter, as well as a second unrelated assessment. The Order stated that “[s]ince the notices were issued on June 1, 2004 and May 14, 2004, but the request was not mailed until May 17, 2005, or in excess of 90 days, the request was late filed.”

3. On September 9, 2013, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The Notice of Intent indicated that, since the Conciliation Order was issued on June 3, 2005 but the petition was not filed until July 5, 2013, the petition was filed in excess of 90 days following the issuance of the Conciliation Order. Therefore, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

4. On January 19, 2006, the Division of Tax Appeals issued a determination in the *Matter of Cunningham* (DTA# 820592). The determination concerned assessment numbers L-023822439 and L-023908640 and held that since petitioner’s request for a conciliation conference was untimely, summary judgment should be granted in favor of the Division of Taxation. There is no evidence that this determination was reviewed by the Tax Appeals Tribunal.

SUMMARY OF THE PARTIES’ POSITIONS

5. Petitioner states that he never received the Conciliation Order. He also states that the Conciliation Order was erroneous because the Queens District Attorney dismissed any charges

that related to tax evasion or the failure to pay taxes. Further, the cigarettes involved in this matter were confiscated. Petitioner submits that he cannot be liable for tax on something that is not in his possession.

5. The Division of Taxation argues that the Division of Tax Appeals is without jurisdiction to hear this matter because the Division of Tax Appeals has already issued a determination “finally and irrevocably” sustaining Assessment No. L-023822439.

CONCLUSIONS OF LAW

A. Tax Law § 2010(4) provides as follows:

A determination issued by an administrative law judge shall finally decide the matters in controversy unless any party to the hearing takes exception by timely requesting a review by the tax appeal tribunal as provided for in section two thousand six of this article.

B. Here, as argued by the Division of Taxation, the Division of Tax Appeals has issued a determination finally deciding the matter in controversy. Accordingly, there is no jurisdiction to hear the current petition.

C. In reaching this conclusion, I am mindful of Tax Law § 2010(5), which provides that determinations of administrative law judges shall not be cited, considered precedent or given force and effect in other proceedings. Nevertheless, it is also recognized that this section is in pari materia with Tax Law § 2010(4) and should be interpreted in a consistent manner (McKinney’s Cons Laws of NY, Book 1 Statutes, § 221). In order to achieve this result, it was necessary to refer to a determination of an administrative law judge.

D. The petition of Joseph Cunningham is dismissed.

DATED: Albany, New York
January 16, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE